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No. 93-1918

In the
Supreme Court of the United States

October Term, 1993

Eddy Lankford,
Petitioner,

v.

Jane Doe,
Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE FIFTH CIRCUIT COURT OF APPEALS

BRIEF *AMICI CURIAE* OF TEXAS ASSOCIATION OF SCHOOL BOARDS, TEXAS ASSOCIATION OF SCHOOL ADMINISTRATORS, TEXAS COUNCIL OF SCHOOL ATTORNEYS AND THE MISSISSIPPI SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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INTEREST OF *AMICI*

Amicus Curiae, the Texas Association of School Boards ("TASB"), is a nonprofit unincorporated association of the public school districts of the State of Texas. All of the 1052 public school districts in the State, through their elected boards of

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[1]Consent of the parties is on file with the clerk of this Court.

trustees, have joined as members of TASB. Under state law, the board of trustees of a school district has "the exclusive power to manage and govern the public free schools of the district." Tex. Educ. Code Ann. § 23.26(b)(West 1987). The members of TASB thus are responsible for the management and governance of the public schools of Texas, consistent with state and federal law.

Amicus Curiae, the Texas Association of School Administrators ("TASA"), represents the state's school superintendents and other school administrators who are responsible for carrying out the educational policies adopted by their local boards of trustees.

Amicus Curiae, the Texas Council of School Attorneys (the "Council"), is composed of attorneys who represent more than 90% of the public school districts of Texas.

Amicus Curiae, the Mississippi School Boards Association ("MSBA"), is a nonprofit

corporation of the public school districts of the State of Mississippi. All 149 public school districts in Mississippi, through their appointed or elected school boards, are members of MSBA. The members of MSBA are responsible for management and governance of the public schools in Mississippi, consistent with state and federal law.

STATEMENT OF THE CASE

Amici incorporate by reference thereto the statement of the case contained in brief of Petitioner.

REASONS FOR GRANTING THE WRIT

The implications of the lower court's decision will have substantial and detrimental effects upon our nation's public school system, a system that is already experiencing widespread and intensifying problems. The court below interpreted "under color of law" to encompass all actions taken by a governmental employee, even those exclusive to his or her private

made the insurer of student well-being under strained interpretations of civil rights law.

STATEMENT OF THE CASE

Amici incorporate by reference thereto the statement of the case contained in brief of Petitioners.

REASONS FOR GRANTING THE WRIT

For school districts the implications of the decision in this case are vast. The same analysis used by the lower court in the case at bar is being followed by numerous other courts to hold school districts and school supervisory officials liable under Section 1983 for their alleged negligence in supervising teachers and other personnel. The cases invoke the same theory to hold school districts and supervisory personnel liable for injuries to students whether the actions allegedly causing the injuries were committed by employees or by other students, and whether or not the injuries occurred off campus or on campus and even impose liability for actions

which, if true as alleged, were nothing more than negligent.

ARGUMENT

I. Introduction

Amici are, of course, deeply disturbed about the despicable conduct of the teacher/coach in this case. *Amici* and school boards and principals across the country are working diligently to develop mechanisms to prevent this kind of conduct and to prevent even the appearance of inappropriate behavior by school employees. For example, *Amicus* NSBA currently sits on an advisory board to the American Bar Association's Center on Children and the Law in its project, funded by the U.S. Department of Justice, to develop mechanisms to screen employees who deal with children, including children in private and public schools. NSBA also has a number of resolutions on this issue, developed by its Delegate Assembly composed of school board

members from every state in the Union. One of these reads as follows:

> NSBA urges state legislatures and agencies to assist school districts in developing methods for preventing, detecting and reporting child abuse. State laws that require reporting of suspected child abuse should also grant immunity for liability for reports made in good faith. School boards should develop policies on this subject that protect both the students and the due process rights of any involved employees. They should also institute in-service training programs for employees and education programs for students.

In addition, NSBA's Council of School Attorneys has recently published a monograph entitled *Child Abuse: Legal Issues for Schools*. A copy of the publication is lodged with the Clerk.

The lower court's zeal to compensate Respondent for her devastating injury is understandable, but the Fourteenth Amendment and Section 1983 were not designed to protect the citizenry from all manner of wrongs, even if perpetrated by a public employee. The

lower court erred in concluding that the U.S. Constitution guarantees students a substantive right to be free from tortious conduct committed by school district employees. Furthermore, even if the lower court were correct in the holding on the constitutional issue, the mechanism of attributing responsibility for the injuries in this case is not in accord with Supreme Court precedent. The "deliberate indifference" standard should be applied only in the criminal context.

I. New constitutional rights should be established by this Court and not by courts of appeals. This Court's continued silence on the issue of whether students have a substantive due process right to bodily integrity in the schools, is being misconstrued by lower courts to allow conversion of state tort actions into Fourteenth amendment cases.

A. Although this Court has never held that students have a substantive due process right to bodily integrity, the Fifth Circuit in the instant case holds that the right is "clearly established."

1. The Fifth Circuit's determination of a new constitutional right does not coincide with this Court's

historically sparing use of substantive due process analysis to protect interests in the penumbra of explicit rights and which have been deprived by the state through statute or an ongoing official practice.

The concept of "substantive due process" encompasses fundamental rights expressly enumerated in the Constitution, *e.g.*, the First Amendment rights of free speech and assembly and free exercise of religion, and interests in the penumbra of enumerated rights, such as the right of privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraceptives) interpreted to be in the penumbra of the right of free association; and to overturn state statutes which implicate liberty interests and are arbitrary and without reasonable basis, *e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (involving the liberty interest in educating one's children in the school of one's choosing); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)

(involving the right to study a foreign language). All of these cases involved state statutes.

This Court has been reluctant to find substantive due process implications in cases which do not involve statutes. In *Wood v. Strickland*, 420 U.S. 315 (1975), the Supreme Court vacated the judgment of the court of appeals which found a substantive due process violation in a school board's alleged misinterpretation of its rule against the possession of alcoholic beverages on school grounds. This Court stated that "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." 420 U.S. at 326.

In 1982, in a *per curiam* opinion, this Court reversed another attempt by the same court of appeals, through the use of substantive due process, to substitute its own judgment for that of the school board. *Board*

of Education of Rogers, Ark. v. McCluskey, 458 U.S. 966 (1982).

A medical student argued in the case of *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), that he had a property interest in a medical school program which gave rise to a substantive due process right to continued enrollment free from arbitrary state action. The Court ruled that the decision to dismiss the student was not arbitrary even if it were assumed that he had a substantive due process right. In a concurring opinion, Justice Powell stated that the Court's assumption on substantive due process was unnecessary.

> While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution . . . substantive due process rights are created only by the Constitution . . . The history of substantive due process "counsels caution and restraint." *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) . . . "Each new claim to [substantive due process] protection must be considered against a

> background of Constitutional purposes, as they have been rationally perceived and historically developed." [Citing *Poe v. Ullman*, 367 U.S. 497, 544 (1961)].

474 U.S. at 229.

2. The Fifth Circuit's decision and other lower court holdings on this issue exceed the limits established by this Court's decisions holding government officials responsible for bodily injuries to individuals only in situations where the state has *affirmatively* restrained the individual either in prison or through involuntary commitment to an institution.

The Fifth Circuit's ruling in this case has no basis in any ruling of the U.S. Supreme Court. All but one of this Court's decisions holding public officials liable for personal injuries to individuals are criminal cases, based either on the Eighth Amendment's proscription against cruel and unusual punishment or on the duty to provide medical care to detained individuals. The exception is *Youngberg v. Romeo*, 457 U.S. 307 (1982),

which upheld state liability for care of an individual who was involuntarily committed to a mental institution. The Court held that the State has a duty to ensure the individual's safety and to facilitate his ability to function free from bodily restraints. The Court equated involuntary commitment of mental patients with incarceration of prisoners, stating that "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed --- who may not be punished at all -- in unsafe conditions." 457 U.S. at 315-16. The Court, however, vacated the lower court decision because the jury was improperly instructed on the assumption that the proper standard of liability was that of the Eighth Amendment.

The operative word in the above quote, of course, is "confine." It is difficult to understand how students, particularly at the high school level, can be said to be

"confined" when they go home after school every day, go out to lunch at noon and have ready access to the principal and other administrators and teachers. Furthermore, most of the acts of the perpetrator in this case occurred outside the school.

Unfortunately, it appears that the lower court's holding, and the holding of a number of other lower courts as well, is based less on a finding that students are "confined" in the same manner as prisoners than on a belief that the actions of a school employee in abusing a child are worse than the action of a jailer in abusing a prisoner and, therefore, students should receive at least the same protections as a prisoner. But it is not the actions of the perpetrator that courts should look to in determining the existence of a substantive due process right, it is the action of the state in placing the student in the school. Did the state's action place the student in a dangerous environment from which

she cannot extricate herself? In this case, the answer to that question has to be in the negative.

In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), this Court emphasized that without *affirmative* state restraint on individual freedom there is no substantive due process violation. Using this approach, the Court refused to hold that a child has a substantive due process right to be protected by state welfare officials from intentional bodily injury inflicted by the child's father even where the officials knew the father was likely to inflict such injury. The Court held:

> The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. [Citations omitted.]. . . In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf -- through incarceration,

> institutionalization, or other similar restraint of personal liberty -- which is the "deprivation of liberty" triggering the protection of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

489 U.S. at 200.

The court in this case distinguished *DeShaney* on the ground that the case involved a private wrongdoer. However, nothing in this Court's decisions indicates an intent to make that distinction.

The lower court decisions on this subject take one of two tracks, by holding either that there is a duty to protect arising from the "special relationship" created by compulsory attendance laws or that there is a substantive due process right to bodily integrity in the schools. The two court of appeals decisions in this case evidence the two theories.[1] Both

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[1] The panel decision in this case which was vacated by the court *en banc*, 975 F.2d 137 (5th Cir. 1992), held that there is a duty to protect students in the public

private actions cannot be the basis for liability against his employer, and thus furthers the purpose of Section 1983: To protect against government employees who exercise their power as government employees to deprive another of his constitutional rights. To the contrary, the Fifth Circuit has altered the effect of Section 1983 to be that of protecting citizens from deprivations of constitutional rights by a state actor under any circumstances.

b. If this teacher's acts were under color of state law, then virtually every act of a government employee will be characterized as being under color of state law.

The effect of the holding below is to include *all* acts, even those undertaken in purely private pursuits, within the purview of Section 1983. The link between the school and the constitutional violation is too illusory to encompass supervisory liability, and carried to its logical

conclusion, raises serious concerns about the extent of liability. The conduct at issue occurred in the teacher's private life, and the connection to the Taylor Independent School District was tenuous. As this Court has held, private actions cannot violate Due Process rights: "....[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 197. As proponents of the public school system, *Amici* would like to be able to protect schoolchildren to the fullest extent. In today's society, however, complete protection is simply not possible. Even if the public schools had infinite resources, they would not be able to protect students from every conceivable harm that might befall them. We do not wish to see a recurrence of the events described by Respondent, but neither can we support the

holding below, which carries a potential for a new and significant basis of liability for school administrators and other local government officials.

B. Our government is premised on a separation of powers, but *Doe v. Taylor* threatens this balance.

This Court has been particularly cognizant of the cooperative relationship between the federal government and the governments of the several States. As guardians of individuals' constitutional rights, the federal courts must occasionally interfere with a state's authority in order to ensure that protection. This exercise, however, is not an inconsequential one, and is only to be used when necessary. As Justice O'Connor observed: "[S]ection 1983 is not a 'federal good government act.'" *Canton*, 489 U.S.at 395 (concurring opinion). This traditional restraint from interference is another rationale for requiring a high degree of fault by supervisory government

officials before attaching constitutional liability--the high threshold limits the frequency with which a federal court would be compelled to intervene in state affairs. The court below, however, has encroached upon this boundary by lowering this threshold. After *Doe v. Taylor*, a supervisory official who had no actual knowledge of constitutional violations by subordinates could be liable under Section 1983, a federal law. This holding not only departs from precedential wisdom, but also allows federal courts to become increasingly involved in the affairs of the States. In fact, this concern has played a pivotal role in more than one decision of this Court. *See, e.g., Rizzo v. Goode; Mitchum v. Foster*, 407 U.S. 225 (1972) (explaining that Section 1983 allows federal courts to issue injunctions in state proceedings, and recognizing the importance of federal nonintervention). While *Amici* respect the

federal courts' role of protector of individual civil rights, we request this Court to consider whether the court below has given adequate consideration to the doctrine of judicial restraint.

II. The court below has declined to follow a substantial line of precedents, threatening the reliability of our legal system.

Our legal system was designed to be dynamic, able to adapt to changes in society and differing factual situations. Although flexibility is an important and desirable goal, it must be balanced with an additional and equally important factor: Certainty. Much of our law has been carved out of court cases in which judges attempt to follow the wisdom and analysis of their peers and predecessors. As this Court stated: "The doctrine of *stare decisis* advances two important values of a rational system of law: (i) the certainty of legal principles and (ii) the wisdom of the conservative vision that existing rules should be

presumed rational 'at any time a new thought seems appealing.'" *Monell*, 436 U.S. at 709, n. 6. As courts announce their interpretations of the law, persons adapt their behavior to conform to these holdings. Change in established precedent may sometimes be necessary, given evolving societal forces or factual novelties, but such change must be made cautiously and only when the need for change is so great that it outweighs the importance of certainty. Furthermore, as now Chief Justice Rehnquist has recognized, the judiciary must realize that many actors have relied upon these prior decisions and may be seriously affected by their alteration: "Only the most compelling circumstances can justify this Court's abandonment of such firmly established statutory precedents." *Monell*, 436 U.S. at 715 (Rehnquist, joined by C.J. Burger, dissenting). Precedents of this Court, including *Rizzo* and its progeny, have

held that supervisory public officials are not liable for constitutional violations in the absence of the supervisor's having engaged in some affirmative conduct. Lower courts have followed the wisdom of *Rizzo* for nearly twenty years. *See, e.g., Gates v. Unified Sch. Dist. No. 449,* 996 F.2d 1035 (10th Cir. 1993); *Stoneking v. Bradford Area School District,* 882 F.2d 720 (3rd Cir. 1989), *cert. denied, sub nom. Smith v. Stoneking,* 493 U.S. 1044 (1990). Although this Court is certainly free to modify or even completely transform the "affirmative act" requirement previously employed, *Amici* suggest that the Court not do so; the reliability of our legal system and the soundness of this approach, evidenced by the length of time this interpretation has endured, are too important to be cast aside. The rules of this Court are never produced hastily, and as Justice Douglas so aptly noted, "should be good for more than one day

only." *Screws*, 325 U.S. at 112. Public policy favors upholding and applying prior law. There are no extenuating circumstances here that would tip the balance in favor of altering a proven, rational form of analysis.

The echoes of judicial holdings reverberate not only in the minds of those who are directly affected, but they resound in other, indirectly affected areas. For example, insurers of public entities rely on settled precedent when planning insurance coverage. *Amici* can only imagine how insurance premiums will escalate once the potential for constitutional liability for *inactions* of supervisory government employees becomes apparent. It is simply one more fray in the already fragile rope that binds our governmental structure. The potential flood of litigation that will flow from decisions like *Doe v. Taylor* could have devastating and lasting effects.

III. Under the new standard in the Fifth Circuit, supervisors are unconditionally liable for the actions of their subordinates.

A. By imposing liability for failure to act, the Fifth Circuit essentially established a negligence standard for supervisors under Section 1983.

1. Negligence does not implicate the Fourteenth Amendment and should not be the basis for Section 1983 liability.

The Fifth Circuit's decision has lowered the Section 1983 standard to simple negligence, contrary to the holdings of other circuits and to precedents established by this Court. *See Daniels v. Williams*, 474 U.S. 327 (1986); *Gates; Jane Doe "A" v. Special Sch. Dist. of Saint Louis County*, 901 F.2d 642 (8th Cir. 1990). Furthermore, the holding sets an unrealistic standard for supervisory officials, requiring them to have a level of omniscience concerning the conduct of their subordinates that is simply impracticable, if not impossible. This unprecedented extension of liability under

section 1983 would allow plaintiffs to proceed under the Fifth Circuit's lower standard of fault to create in essence *de facto* strict liability for all supervisory officials.

Prior to the decision below, Section 1983 liability had been imposed primarily upon supervisory defendants who demonstrated deliberate indifference after receiving actual notice of constitutional violations. *Daniels; Gates; Woodward v. City of Worland*, 977 F. 2d 1392, 1399 (10th Cir.), *cert. denied*, 113 S.Ct. 3038 (1992). This prerequisite of notice prevented the standard from becoming one of mere negligence, a transformation which this Court has explicitly sought to preclude:

> To Justice Powell, mere negligence could not "wor[k] a deprivation in the *constitutional sense*." Not only does the word "deprive" in the Due Process Clause connote more than a negligent act, but we should not "open the federal courts to lawsuits where there has been no affirmative abuse of power."

Daniels, 474 U.S. at 330 (citing *Parratt v. Taylor*, 451 U.S. 527, 548-49 (1981)). This Court made clear that Section 1983 liability must be based upon a "deliberate" or "conscious" deprivation of constitutional rights. "Deliberate" implies some amount of scienter, higher than negligence, but lower than intent. In other words, the defendant must have been conscious of an excessive risk that violations may be occurring. *Farmer v. Brennan*, 62 U.S.L.W. 4446, 4448-49 (U.S. June 6, 1994); *Canton*, 489 U.S. at 390. Consequently, without notice of an excessive risk of *constitutional* violations, a defendant could not be liable for failure to prevent a subordinate from committing those violations. For example, although a high school principal knew that a female student was infatuated with a teacher and the teacher encouraged her, without evidence that the principal knew the student had been sexually assaulted or that she had been

otherwise deprived of any constitutional right, the principal was entitled to qualified immunity. *Gates*, 996 F.2d at 1042. Similarly, Petitioner in this proceeding had heard rumors about a student-teacher relationship, but there were no specific allegations of constitutional deprivations. Evidence also shows that Petitioner's superior questioned both Respondent and the coach, but both denied any sexual relationship, leaving Petitioner with no justification to believe that sexual assault or other sexual abuse had occurred. *Doe v. Taylor*, 15 F.3d at 449. As he was neither conscious of an excessive risk nor had actual notice of any constitutional violations, Petitioner would be relieved of liability under decisions of other circuits. *Gates; Jane Doe "A"*. The record here does not support a conclusion that Petitioner was aware of an excessive risk; therefore, he could not have been deliberately

indifferent. At most, Petitioner's conduct failed to measure up to that of a reasonable person--he may have acted with a lack of due care, but his conduct did not rise to the level necessary to warrant liability under Section 1983.

2. The requisite affirmative link between the supervisor's conduct and the subordinate's misconduct was disregarded by the court below.

This Court has interpreted Section 1983 to require an "affirmative link" between a supervisor's conduct and a subordinate's misconduct: "By our decision in *Rizzo v. Goode* we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability." *Monell*, 436 U.S. at 694, n. 58. A finding of causation is therefore crucial to a civil rights claim, yet such is fatally lacking in Respondent's allegations. Without

explanation, the Fifth Circuit concluded that, had Petitioner acted, he could have prevented or at least minimized the violation of Respondent's constitutional right to bodily integrity. *Doe v. Taylor*, 15 F. 3d at 457. This leap of logic, however, is somewhat precipitous; case law generally requires more evidence of causation: "...[A]ll of the circuits agree that, at a minimum, supervisory liability requires a cause in fact relationship between the supervisor's action or inaction and the plaintiff's constitutional deprivation." 1 Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983*, § 3.23, at 247 (3rd Ed. 1991). In the instant case, a contrary conclusion would be equally viable: Even if Petitioner had intervened, the constitutional violations could have occurred nonetheless. In light of both the student's and the coach's denials of any

misconduct, Petitioner certainly lacked sufficient evidence to terminate the employment of the coach. A reprimand would not necessarily have ended the relationship; the intensity of the relationship might have been unaffected by a school administrator's actions.

By neglecting to find an "affirmative link," *Doe v. Taylor* has created the possibility that lower courts will hold supervisors vicariously liable for all unconstitutional acts of their subordinates, regardless of the level of the supervisor's involvement or knowledge. Moreover, the *Doe v. Taylor* holding is contrary to the language of the statute and to the holdings of this Court. Other circuits have stopped short of basing liability on the failure of supervisory officials to act or investigate, and require a plaintiff to prove that a direct nexus exists between the constitutional violations and the

supervisor's condonation or authorization thereof. *D.T.*, 894 F.2d at 1187; *Stoneking*, 882 F.2d at 730. Ultimately, of course, causation is a question of fact, but *Amici* urge the Court to consider clarifying this issue before the lower courts encounter further confusion.

3. Congress has amended the Civil Rights Act but has refrained from adding liability for nonfeasance.

Since the inception of the Civil Rights Act, Congress has periodically amended its provisions to address situations that may not be specifically covered by the Act and to correct areas that have proven problematic. Although courts have declined to impose liability upon supervisors for nonfeasance under Section 1983, Congress has not responded, implying its approval. *Amici* urge this Court to allow the United States Congress to decide whether the standard in Section 1983 should be revised to include supervisory nonfeasance.

B. Imposing liability on someone who has neither committed an offense nor has any actual knowledge or notice of the constitutional violation sends an unclear message.

1. This holding establishes no clear standard of conduct for supervisory officials.

The amount of knowledge a supervisory official has concerning the activities of his or her employees is especially relevant to the standard for imposing supervisory liability under Section 1983. A supervisor simply cannot be concerned with tracking every action of every employee under his or her control. While a supervisor may have a general idea of subordinates' activities, he or she may have no means to discern that a subordinate is engaging in conduct that violates constitutional rights. Even if a supervisor has notice of *tortious* actions of a subordinate, notice of actual *constitutional* violations does not necessarily follow; this difference could be crucial to the outcome of a Section 1983

action. It would advance no public policy nor any purpose of Section 1983 to impose liability upon supervisors who have no knowledge of constitutional violations. Requiring a supervisor to intuit constitutional violations would transform the nature of Section 1983 liability into a standard approaching tort liability for negligence. Any determination of liability is a serious matter, but liability for a constitutional violation is, of course, a matter of great consequence, and one for which there should be a clear standard of conduct. Absent such guidance, government employees have no frame of reference from which to model their conduct. The court below, without much explanation, did not set forth any such standard. It arrived at the determination that Petitioner could have been deliberately indifferent. What are school administrators and other supervisory officials to learn from this decision? To

discipline or terminate all employees on the basis of apparently unsubstantiated rumors? Administrators are limited in their ability to discipline by the due process rights of employees. In the absence of concrete evidence, the recommended code of conduct required by *Doe v. Taylor* is unclear.

In the test articulated for supervisory liability, the court below lowered requirements used by other circuits to allow a finding of liability if a supervisor "learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student." *Doe v. Taylor*, 15 F.3d at 454. While the goal behind this standard is an admirable one--increased protection of civil rights--it does not provide sufficient guidance for supervisory school officials. It has the potential to subject a supervisor to strict liability, for if he or she fails

to glean that constitutional violations are occurring and a court later determines that the supervisor should have done so, the transgressions of the subordinate become those of the supervisor. Not only does this test incorporate a significant amount of subjectivity by depending upon the deductive capabilities of the supervisor, but it also conflicts with decisions of the Eighth and Tenth Circuit Courts. *Gates*, 996 F.2d 1035 (10th Cir. 1993); *Jane Doe "A"*, 901 F. 2d 642 (8th Cir. 1990). Furthermore, it contradicts this Court's refusal to insinuate *respondeat superior* into a Section 1983 action, as established in *Monell*.

This Court recently held that deliberate indifference entails a higher standard than negligence. The public official must be reckless to the extent of knowing of and disregarding an excessive risk to health or safety. *Farmer v. Brennan*, 62 U.S.L.W. at 4449. *Farmer* was

the first decision of this Court which paused to explain the meaning of the term "deliberate indifference." *Id.* at 4448. Although the Court clearly limited its holding to cases arising under the Eighth Amendment, *Amici* urge the Court to extend *Farmer's* subjective test for deliberate indifference to *all* cases involving individual liability. Not only will such a measure provide a reasonable and consistent standard for public officials, but it will also provide much-needed guidance to the lower courts that constantly struggle with this very concept. In *Farmer*, the Court carefully distinguished its test from the one announced in *Canton*. *Id.* at 4450. *Amici* agree with this distinction and believe that the *Canton* objective test should be retained for proceedings against governmental *entities*. For *individuals*, however, the *Farmer* test is a much more logical and reasonable choice. Some courts, including

the Fifth Circuit, have extended the *Canton* test to individual public officials. *Doe v. Taylor,* 15 F.3d at 453; *Sample v. Diecks,* 885 F. 2d 1099, 1117-18 (3rd Cir. 1989). This extension, however, does not withstand scrutiny: "Needless to say, moreover, considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official." *Farmer,* 62 U.S.L.W. at 4450. Extending the subjective test adopted by this Court in *Farmer* would only be beneficial to our constitutional jurisprudence. Henceforth, public officials would understand the legal standard under which their actions would be examined, and "deliberate indifference" would gain the same familiarity of meaning as "negligence" and "recklessness." Reliability, consistency, and clarity would be restored to Section 1983 litigation.

In the Eighth Circuit, liability may attach when a defendant has notice of a pattern of unconstitutional acts. Without actual notice, a supervisor could not be deliberately indifferent nor could he tacitly authorize a subordinate's violation of another's constitutional rights. *Jane Doe "A"*, 901 F.2d at 646. The Tenth Circuit has adopted a similar standard--its test requires that a supervisor receive notice "of a pattern of violations of female students' constitutional rights to be free of sexual abuse at the hands of the school district's employees." *Gates*, 996 F.2d at 1041. Thus, without evidence that a school supervisor had notice of sexual misconduct, there could be no personal liability. *Id.* at 1042. By contrast, in the Fifth Circuit a supervisory official can now be considered deliberately indifferent without *actual* notice. If rumors or hearsay establish in at least one court's opinion that the facts

"pointed plainly toward the conclusion" that constitutional rights were being violated by subordinates, then the unconstitutional conduct could be attributable to that supervisor. In so holding, the Fifth Circuit has diminished the threshold for a Section 1983 action to one that approaches simple negligence, contrary to precedents of this Court. *See, e.g., Daniels.* *Amici* urge this Court to consider whether *Doe v. Taylor* truly comports with this Court's interpretation of civil rights liability in similar situations.

2. Without notice of possible harm, it is impossible to prevent that harm.

A primary reason for imposing liability is to deter actors from committing wrongs. In the holding below, denying Petitioner immunity from liability would certainly punish him, but there is no attendant guidance to direct future conduct. The lesson to be learned from imposing liability

in this case is unclear, and would serve only one function--to punish a school administrator for something that he could not have foreseen and to impose an unrealistic responsibility on school administrators. Preventing constitutional violations is an important goal, but the ability to discern violations as insidious as sexual abuse is an inherently difficult, subjective process. If an administrator dutifully investigates and a student actually reveals that his or her constitutional rights have been violated, then an administrator has a basis upon which to act. But when the student denies violations, as did Respondent, then it is unreasonable to expect the supervisor of the wrongdoer to prevent the violations. Without warning, no one can prevent harm. It is unrealistic to suggest otherwise, and imposing such a legal duty furthers no rational public policy.

3. Hindsight is a luxury unavailable to supervisory school officials; liability for nonfeasance would be totally impracticable when there is insufficient notice.

Amici are concerned about the welfare and education of public school students. While we abhor the situation described by Respondent, we ask this Court to view the situation through Petitioner's perspective. After reviewing the facts in 1994, it might seem obvious that Respondent's rights were being violated in 1987. Petitioner, however, did not have the benefit of hindsight, nor was there adequate guidance concerning this issue. Even today, *Amici* question whether it would be realistic to expect a school administrator to exercise such control over his or her teachers that he or she would be aware of *constitutional* violations committed by teachers when they were not at school. School administrators have a multitude of duties, not the least of

which is overseeing the activities of, often, several hundred teachers, students, and other employees. On any given day, they may have to choose between spending time responding to weapons, drugs, or other discipline problems, assisting and evaluating teachers, providing instructional leadership, conferring with students and parents, or preventing violence on campus. The court below has created an additional duty that requires a supervisor to investigate not only bona fide complaints, but also to scrutinize the most superficial rumors. If no limits are placed upon the nature and scope of a supervisor's investigation, this duty could become absurd, resulting in an infinite number of needless and fruitless searches. Will our public schoolchildren benefit from defensive and self-protecting supervisory activities or will this decision merely divert resources and encourage persons to pursue

litigation? *Amici* suggest that a supervisor's liability for misconduct of subordinate employees be considered only when those employees are engaged in activities that are in the course and scope of their employment, are under the supervisor's control, and are known to the supervisor.

CONCLUSION

Finally, *Amici* remind the Court that every time a school administrator is found liable, our schools and thus our children are ultimately deprived of resources that could have been used for education. *Amici* do not wish to relieve administrators or public officials from *all* constitutional liability; to the contrary, we accept that such responsibility must be retained, so that meritorious cases do not go unaddressed and constitutional rights are preserved. In this case, however, we would suggest a review of the lower court's opinion. Given

the nature of our public school system and the importance of education in this country, we would hope that, in situations where administrators were unable to prevent constitutional violations, constitutional liability would not attach. Allowing the holding below to stand would obviously permit more plaintiffs to recover for alleged constitutional violations, but only at the expense of too many others. The value of children's educational experience would be diminished because their school administrators would have to be primarily concerned with avoiding constitutional liability and forced to neglect pedagogical concerns. Under the current holding, liability of administrators is possible in so many situations that public funds will continuously be depleted at the expense of more teachers, better educational programs, and safer campuses.

For all the foregoing reasons, *Amici* urge this Court to grant the petition review this case.

Respectfully submitted,

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